IN THE HIGH COURT OF JUDICATURE AT MADRAS

Date: 02.04.2007

CORAM:

THE HON'BLE MR. JUSTICE P.JYOTHIMANI

Second Appeal No.733 of 1995

1. Arukkani (died)
2. Jayalakshmi ... Appellants/Appellants/Defendants
3. Marappan
4. Thangammal

Appellants 3 and 4 are brought on record as the LRs of the deceased 1st appellant vide order dated 11.06.1996 in C.M.P.No.694 of 1996

... Appellants

Vs.

Subramaniam

... Respondent/ Respondent/ Plaintiff

PRAYER: Second Appeal against the Judgment and decree of the Subordinate Judge, Namakkal dated 28.01.1993 and made in A.S.No.51 of 1992 confirming the judgement and decree of the Court of the Additional District Munsif of Namakkal dated 08.10.1991 and made in O.S.No.1062 of 1986.

For Appellants : Mr.N.Manoharan for Mr.K.Kumaravel

For Respondent : Mr.R.Saseetharan for Mr.R.Janakiraman

J U D G M E N T

The unsuccessful defendants before the Courts below are the appellants. The plaintiff filed the suit for declaration and injunction in respect of the house property. Pending second appeal, the first appellant died and her legal representatives were brought on record as appellants 3 and 4. The plaintiff is the brother of defendants 1 and 2. It is stated that the first defendant is blind and the second defendant is a widow.

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2. The case of the plaintiff is that his father Palanipandidhar was the owner of the suit property and by a registered settlement deed dated 31.08.1970, which is marked as Ex.A.1, he settled the property in favour of the plaintiff and ever since the date of the settlement, he has been in possession and enjoyment of the suit property by paying house tax, etc. It is also the case of the plaintiff that the settlement deed executed by his father under Ex.A.1 is irrevocable since he had no such right. It is also his case that ten years after the settlement deed was executed, the defendants have fraudulently taken away the original settlement deed from the plaintiff's possession and had obtained a cancellation deed dated 07.06.1980 cancelling the said settlement deed, which stands marked on the side of the defendants as Ex.B.1, and also obtained a settlement deed in their favour on 07.07.1980, which stands marked as Ex.B.2. According to the plaintiff, though the defendants had accepted the settlement made in his favour by his father on 31.08.1970, yet, they are attempting to interfere with his possession and therefore, he filed the said suit.

3. The defendants, while admitting in the written statement about the settlement deed dated 31.08.1970 marked as Ex.A.1 written by Palanipandithar in favour of the plaintiff, would however deny the statement that the plaintiff is in possession of the suit property. It is the case of the defendants that after the said settlement deed, Palanipandithar himself was enjoying the property and since the plaintiff did not maintain his father, by document dated 07.06.1980, their father had cancelled the settlement deed and a new settlement deed was executed in their favour on 07.07.1980, based on which, possession was given to the defendants and it is the defendants, who have been maintaining their father as well as their aged mother. The defendants have also filed additional written statement stating that the plaintiff had obtained settlement deed from his father on 31.08.1970 by giving a false promise to him that the plaintiff would maintain him during his lifetime by providing food, shelter, etc. It is also their case in the additional written statement that their father, thinking that he is signing a "will", had signed the settlement deed but kept the same with him since the plaintiff had failed to maintain him. The father of the plaintiff, after seeing the document which was in his possession and having found that it was obtained as settlement in a fraudulent manner, had cancelled the same on 07.06.1980 and executed another settlement deed on 07.07.1980 in favour of the defendants.

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4. The Courts below have concurrently held that since Palanipandithar had settled the property under Ex.A.1 (settlement deed) dated 31.08.1970 in favour of the plaintiff, he has no right of revocation or any other right over the said property and therefore granted a decree in favour of the plaintiff, as against which, the defendants have filed the present Second Appeal.

5. While admitting the Second Appeal, the following substantial question of law was framed by this Court:

> "Whether on the facts and circumstances of the case the Lower Appellate Court committed material error in law in not presuming and not shifting the burden on the respondent to prove that Ex.A.1 has been obtained by the respondent by undue influence, coercion, misrepresentation and fraud?"

6. It is seen from the records that Ex.A.1 - settlement deed executed by Palanipandithar in favour of the plaintiff on 31.08.1970 is a registered settlement deed and it does not contain any clause enabling the settlor to revoke the same. It is also seen that on the date of settlement, the settlor had given possession of the property to the plaintiff, which has been found by both the Courts below. It is further seen that though the defendants, in the original written the statement as well as in the additional written statement had admitted the execution of Ex.A.1 by Palanipandithar, yet, they have chosen to state in the additional written statement that the plaintiff got Ex.A.1 executed by misrepresenting his father that it was a "will". The very fact that the plaintiff was not given possession of the document shows that Palanipandithar was keeping the document with him and after 10 years when he happened to see the said document, he came to know that it was a registered settlement deed and therefore he revoked the same under Ex.B.1 dated 07.06.1980 and executed a fresh settlement deed dated 07.07.1980 in favour of the defendants under Ex.B.2.

7. Therefore it is clear that it was the positive case of the defendants in the additional written statement that what was obtained by the plaintiff under Ex.A.1 was obtained by fraud and misrepresentation. It is to prove the same, the mother of the plaintiff and defendants, namely, Papayee, was examined as D.W.3, who had chosen to state that her husband - Palanipandithar was made to sign in Ex.A.1 on the belief that it was a "will".

8. Learned counsel for the appellants would rely upon a Division Bench judgement of this Court rendered in K.Varadhan Vs. Pattammal (died) and four others reported in 1992(2) LW 209 wherein

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this court, by referring to Sections 101 and 102 of the Indian Evidence Act, and applying the principle of non est factum, had held that the onus of proof that the defendant has played fraud upon the plaintiff, exercised undue influence, misrepresentation, etc. was not on the plaintiff, but lies on the defendant to prove that there was no misrepresentation, fraud, etc. since by such vitiating factors the contract is deemed to have been not in existence. The principle of non est factum based on the vitiating factors of fraud, undue influence, coercion, etc. as quite contrary to the provisions of Section 15 to 18 of the Indian Contract Act have been explained in detail by the Division Bench by referring to the passages from Cheshire and Fifoot's Law of Contract wherein, by referring to the judgement in Foster Vs. Mackinnon reported in 1869 LR (4) CP 704, the author has quoted the passages from the judgement as follows:

> "It seems plain on principle and on authority that if a blind man, or a man who cannot read or who for some reason (act implying negligence) forbears to read, has a written extract falsely read over to him, the reader his reading to with a degree that the written contract is of a nature altogether different from the contract pretended to be read from the paper which the blind or illiterate man afterwards signs; then, alteast if there be no negligence, the signature so obtained is of no force. And it is invalid not merely on the ground of fraud, where fraud exists, but on the ground that the mind of the signer did not accompany the signature; in other words that he never intended to sign, and therefore in contemplation of law never did sign, the contract to which his name is appended (ibid at 711)"."

9. It is based on the celebrated concept that "a man's deed is not his deed if his mind does not go with his pen" as observed by Lord Reid, the Division Bench has examined Sections 101 and 102 of the Indian Evidence Act with particular reference to women in India who are either pardanisan or in most part of the country illiterate and their transaction of business generally through menfolk and therefore, considering that the plaintiff / appellant in that case had put a thumb impression, has shifted the burden on the defendant to show that the plaintiff who put her thumb impression was informed fully about the contents of the document. The relevant passage from the Division Bench judgment is as follows:

> "8. Courts in India have on the rule of evidence enshrined in Ss.101 and 102 in Chapter VII of the Evidence Act, particularly in cases of women in India who in some parts and some communities are pardanashin and in most

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parts of the country illiterate, for the reason that they transact their business generally through malefolk only, men always dominated women, and women lived a life dominated by man, this being the curse that always surrounded womenfolk even though law recognised their independent rights, they failed invariably in exercising such rights, accepted that onus lies upon the defendant to show that there has been no fraud, undue influence or coercion in the transaction. One could easily, since the plaintiff alleged misrepresentation and fraud, ask her to prove the misrepresentation and fraud. But not in a case where she being an illiterate and unaware of the contents signed the document. Unless and faithfully informed about the contents, she cannot be asked to bring evidence to prove her case. Learned single Judge, in our opinion, is right in holding that the Court will not ask the plaintiff to prove the allegation, but demand from the defendant to disprove the allegation of misrepresentation and fraud. The learned single Judge, in our opinion, has taken the correct view of the law on the face that the 1st plaintiff is an illiterate woman who merely affixed her thump impression. She is a woman who possibly could not act without help."

10. On the facts and circumstances of the present case, I have no hesitation to come to the conclusion that the said judgement has no application. In the present case it was not the case of the defendants at any point of time that Palanipandithar was either illiterate or has signed Ex.A.1 not knowing that it was a settlement deed. It is the specific case of the defendants in their original written statement that Palanipandithar had signed the settlement deed, the execution of which was categorically admitted by the defendants on the basis that the plaintiff would maintain his father Palanipandithar.

11. It is only in the additional written statement subsequently filed, the defendants have made a new statement about the fraud, undue influence and misrepresentation, etc. stated to have been played by the plaintiff. In the light of the contrary stand taken by the defendants, I do not think that it is safe to apply the principle of non est factum for the purpose of shifting the onus on the plaintiff in this case to prove that his father has signed Ex.A.1 settlement deed knowing the contents thereof.

12. However, it is seen that the plaintiff has examined the attestor of Ex.A.1 Veerappa Gounder as P.W.2. The reliance placed on by the learned counsel for the appellants that the judgement of

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this Court rendered in the case reported in Dharman & Six others Vs. Marimuthu reported in 1996(II) CTC 279 wherein by referring to a pleathora of decisions of this Court has held that on the face of the nature of transaction covered by the documents if the same is unconscionable or unnatural then the burden shifts on the person to prove that the transaction was not induced by undue influence. Ultimately, this Court has held

> "17. The various decisions referred to above would go to show that if on the face of the document and the nature of the transaction covered by the document appears to be either unconscionable or unnatural one, the burden of proving that the transaction was not induced by undue influence was considered uniformly to rest with the beneficiary under the document. That apart, the various decisions noticed also point out sufficiently indicating as to what type of circumstances present in a particular or given case could be taken to provide the necessary indicia or test to form an opinion about the unnatural or unconscionable character of the transaction. In the case on hand the contents of the gift deed in question and the consequences that may be brought about if the gift under Ex.A.1 is sustained and enforced are to be analysed in the light of the principles referred to above. Some of the admitted facts and stalk realities flowing therefrom cannot escape the attention of any judicial forum dealing with any issue before it objectively and judiciously."

13. Again it is not a case where the settlement deed executed by Palanipandithar in favour of the plaintiff under Ex.A.1 dated 31.08.1970 is questioned by the defendants. On the other hand, it is their case that their father, after 10 years of execution of Ex.A.1, had cancelled the settlement deed on the basis that his son / the plaintiff did not maintain him as promised by him. A reference to Ex.B.1 stated to have been executed by Palanipandithar on 07.06.1980 cancelling the earlier settlement deed executed by him in favour of the plaintiff on 31.08.1970 marked as Ex.A.1 shows that nowhere in the said document Palanipandithar had stated that he was made to sign Ex.A.1 settlement deed dated 31.03.1970 in favour of the plaintiff believing the same to be a "will" and after realizing that by undue influence the plaintiff had forced him to sign the said settlement deed by making a misrepresentation that it is a "will" and that prompted him to cancel Ex.A.1. Therefore, it is clear that the father had only cancelled the settlement deed given by him in favour of the plaintiff on 31.08.1970 by cancellation deed dated 07.06.1980 marked as Ex.B.1 on the ground that his son, namely, the plaintiff, did not choose to maintain him. Therefore, on the factual position as found by both the Courts below, there is

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no difficulty to come to the conclusion that the defendants cannot raise a new plea as if the father was forced to sign Ex.A.1 believing it to be a "will" which later was revealed to be a settlement deed and therefore it should be a nonest factum.

14. In the light of the above said factual position particularly with reference to the contents of Ex.B.1 cancellation deed, I do not think that the judgements relied up by the learned counsel for the appellants as stated above and also in respect of Section 23 of the Indian Contract Act regarding undue influence as held by the Hon'ble Supreme Court in Mst.Sethani Vs. Bhana reported in AIR 1993 SC 956 have any application to the facts and circumstances of the present case. That was the case wherein a sale deed was stated to have been executed by a Tribal woman, who was old, illiterate and blind in favour of her relative and in such circumstances, while referring to the provisions of Section 101 of the Indian Evidence Act, the Hon'ble Apex Court has held that the respondents had not let in any evidence to discharge the onus that the sale deed was executed without undue influence.

15. As I have stated earlier, on the factual position of this case, especially with reference to the contents of Ex.B.1, admittedly executed by the father of the plaintiff Palanipandithar, it is not the case of the defendants that the plaintiff, using undue influence, fraud or any of the vitiating factors, obtained the said document. There is one other factual position in this case, which has to be decided i.e., when once Palanipandithar had executed Ex.A.1 settlement deed on 31.08.1970 without referring to any right of revocation or cancellation and stating that the settlement deed is not revocable and also stating that even if such cancellation is made, the same is not valid, whether Ex.B.1 cancellation deed is valid in law? As rightly held by the Courts below, while referring to Section 126 of the Transfer of Property Act, this Court has held in the judgement rendered in Murikipudi Ankamma Vs. Thummalacheruvu Narasayya and others and others reported in AIR (34) 1947 Madras 127 that in the absence of any reservation of his power by the donor to revoke the gift, the same cannot be revoked. The relevant portion of the said judgement of this Court is as follows:

> "The gift was entirely out of love and affection and the reference to maintenance was only as a matter of fond wish. In this view it is not possible to agree with the appellant's contention that in the absence of any express reservation of a power of revocation, the donor continued to have that right, even after he had divested himself of all the right, title and interest in the property by means of this gift and after he had duly vested the property in

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the donee. The document itself further recites that the property had then alone been delivered into the possession of the donee."

16. The facts of the said case also corresponds to the fact in issue in the present case. This was also the view taken by the Bombay High Court in the judgement rendered in Khushalchand Bhagchand Vs. Trimbak Ramachandra and others reported in AIR (34) 1947 Bombay 49.

17. It is relevant to point out that at the earliest point of time when the defendants gave a reply notice dated 24.07.1986 marked as Ex.A.4 to the suit notice given by the plaintiff, it was only the case of the defendants that the cancellation deed was made by the father only due to the reason that the plaintiff did not maintain him and that has resulted in cancellation of the settlement deed. Even in that earliest reply notice, the defendants have not taken a stand that the father of the plaintiff was made to believe that what was signed by him under Ex.A.1 was only a "will" and not a settlement deed. In fact the learned First Appellate Judge has considered the contradictory stand of the defendants and disbelieved the same on factual position. In view of the above said facts and circumstances, I am of the considered view that the judgement and decree of the Courts below do not suffer from any illegality and therefore, no question of law much less a substantial question of law arise for consideration in this Second Appeal. With the result, the Second Appeal fails and the same is dismissed. No Costs.

Sd/
Asst. Registrar

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Sub Asst.Registrar

nbj

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To

1. The Subordinate Judge,
Namakkal.

2. The Additional District Munsif,
Namakkal.

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3. The Record Keeper
VR Section, High Court, Madras.

1 cc to Mr.N.Manoharan, Advocate, sr. 20986

S.A.No.733 of 1995

RS (CO)
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